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No. 88 –

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1988

HORACE M. CHAMBERS

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HORACE M. CHAMBERS
1833 HOWE AVENUE
SACRAMENTO, CA 95825
(916) 921-6216

DECEMBER 16, 1988

QUESTIONS PRESENTED FOR REVIEW

1. Whether use of Federal funds for "White flight" constitute a violation of Title VII because it has an adverse impact on minorities and women.

2. Whether reprisal action taken against petitioner because he opposed use of Federal funds for "White flight" constitute a violation of Title VII?

3. Whether the District Court and the Court of Appeals conducted proceedings in accordance with the Federal Rules of Evidence, and, if not, was petitioner denied his constitutional right to a fair trial.

4. Whether misrepresentations made by the U.S. Army Audit Agency to justify the relocation from Redwood City, CA to Sacramento, CA constitute fraud.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. _____

HORACE M. CHAMBERS

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Horace M. Chambers, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit entered on 21 October 1987.

OPINION BELOW

The Court of Appeals entered its Memorandum decision affirming the order of dismissal of petitioners complaint without prejudice on 21 October 1987. A copy of the memorandum is attached as Appendix A.

The Court denied petitioner's motion for rehearing and suggestion for rehearing en banc on 13 January 1988. A copy of the order is attached as Appendix B.

JURISDICTION

On 21 October 1987 the Court of Appeals entered judgment affirming the decision to dismiss petitioner's complaint without prejudice. [App. A.] The jurisdiction of this Court is invoked under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. s2000e-5(f) (1))1981).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Title VII of the Civil Rights Act of 1964.
2. The Constitutional right to a fair trial.

STATEMENT OF THE CASE

On 21 October 1987, a panel of the Ninth Circuit of Appeals affirmed the order of dismissal of petitioner's complaint of employment discrimination without prejudice. A timely petition for rehearing was filed. Petitioner had also filed a motion for judicial notice on whether or not the misrepresentations made to justify the relocation constituted fraud and if use of Federal funds for "White flight" constituted a violation of Title VII. The petition for rehearing and motion for judicial notice were denied on 13 January 1987.

REASONS FOR GRANTING THE WRIT

The court proceedings were not conducted in accordance with normal judicial proceedings. And, the Appeals Court decision conflicts with the decision by this Court in Griggs v. Duke Power Co., 401 U.S. 424, 3 EPD 9 8137 (1971).

In August 1982, the U.S. Army Audit Agency relocated from Redwood City, CA to Sacramento, CA. The only reason for the relocation was to allow one white man to purchase a home in a white neighborhood at less cost. Thus, the allegation that Federal funds were used for "White flight". The relocation cost about $300,000 and increased annual operating cost by at least $100,000. As a result of the relocation, 9 female employees and 2 male minority employees lost their jobs.

For 6 years petitioner has been subjected to reprisal action waiting for deciding officials to state whether or not use of Federal funds for "White flight" constitutes a violation of Title VII.

If the Army, EEOC, Justice Department, District Court and Court of

Appeals are of the opinion that use of Federal funds for "White flight" are not a violation of Title VII, despite the adverse impact on minorities and females, this should clearly be stated and justified in the written decisions.

The Army and Justice Department committed an apparent fraud when they submitted a status report to the District Court stating there were numerous legitimate reasons for the relocation. There were no numerous legitimate reasons, so none were identified. The issue of using Federal funds for "White flight" was raised in the complaint to the District Court, the District Court did not address the issue. A copy of the order denying motion for appointment of counsel is provided at Appendix C.

The EEOC issued an opinion stating petitioner had not provided any evidence that Sacramento was more racially segregated than the San Francisco Bay Area. This statement was repeated in the memorandum [App. A] by the Appeals Court. Sacramento is more racially segregated than the San Francisco Bay Area. But, even if it was not, would this change the fact that Federal funds were used for "White flight"? Does it change the fact that this practice has an adverse impact on minorities and females? The memorandum by the Appeals Court does not state why the use of Federal funds for "White flight" does not constitute a violation of Title VII or why the use of Federal funds to permit one white man to purchase a home in a white neighborhood should not be considered "White flight".

Rule 301 of the Federal Rules of Evidence, imposes on the party against whom it is directed, the burden of going forward with evidence to rebut or meet the presumption. Federal funds were used for "White flight", this fact is unrefutable, so no evidence was provided to rebut the presumption. Therefore, law and justice required a conclusion that Federal funds were used for "White flight" be reached and be included in the written decisions.

In Griggs, this Court established that practices or policies, that were not a business necessity and had an adverse impact on minorities or women, constituted a violation of Title VII. With the fact that Federal funds were used for "White flight" and that this practice had an adverse impact on minorities and women established, the Federal question is whether "White

flight" constitutes a business necessity. The apparent opinion by the Appeals Court that it must be proven there was a racially discriminatory intent before the practice of using Federal funds for "White flight" constitutes a violation of Title VII contradicts this Courts opinion in Griggs.

The opinion by the Appeals Court included a presumption that the move could reasonably be construed as beneficial to minority employees. This presumption suggests that use of Federal funds for "White flight" is not a violation of Title VII if one minority employee is helped and 30 minority employees are adversely effected. Further, this presumption ignores the historical fact the "White flight" has an adverse impact on minorities by removing employment opportunities for minorities. The decrease in the number of minority employees subsequent to the relocation supports history.

Management personnel from Army Audit deliberately misrepresented the facts to justify the relocation. The question to determine whether the misrepresentations constitute fraud should be whether the move would have been approved based on the facts. The petitioner does not believe the move would have been approved if the written justification stated Federal funds were being requested so a white man could purchase a home for less in a white neighborhood. The petitioner does not raise the issue of fraud to compare to actions taken against individuals that commit welfare fraud or employees that submit fraudulent vouchers. Although petitioner is deeply concerned that Federal agencies are defending the right to commit fraud to obtain Federal funds for "White flight". The petitioner raised the issue of fraud in this instant case because of credibility.

In deciding whether reprisal action was taken against petitioner, deciding officials give more credibility to statements by individuals that have shown a willingness to commit fraud. If not fraud, at least to misrepresent the facts. Reprisal action was taken and continues to be taken against petitioner because he opposed the use of Federal funds for "White flight". The petitioner was suspended twice and denied earned promotions and awards.

Justice delayed is justice denied. The refusal by deciding officials to address the issues of this case has denied petitioner justice. The allegations

by petitioner have not been rebutted because they could not be. Petitioner filed a motion for a judicial notice in an attempt to resolve this case. Although Rule 201(d) of the Federal Rules of Evidence provides a judicial notice is mandatory, the Court of Appeals denied the motion. No reasonable person can say that petitioner has received a fair trial when the essential question of whether use of Federal funds for "White flight" constitutes a violation of Title VII was not addressed.

CONCLUSION

For the foregoing reasons, petitioner Horace M. Chambers respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully Submitted,

Horace M. Chambers
Plaintiff-Appellant
1833 Howe Avenue
Sacramento, CA 95825
(916) 921-6216

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HORACE M. CHAMBERS, Plaintiff-Appellant, v. UNITED STATES ARMY AUDIT AGENCY, Defendant-Respondent.	No. 86-1719 Dist. Ct. No. C-85-3531 SC (N.D. Cal) MEMORANDUM*

Appeal from United States District Court
in and for the Northern District of California
Samuel Conti, District Judge, Presiding
Argued & Submitted September 18, 1987 - San Francisco, CA **

BEFORE: Canby and Boochever, Circuit Judges, and
Pfaelzer, District Judge ***

Horace M. Chambers appeals from the District Court's dismissal of this action for failure of service under Fed. R. Civ. P. 4. Chambers also appeals from the District Court's denial of his motion for appointment of counsel under 42 U.S.C. § 2000e-5(f) (1) (1981). We review both of these decisions for abuse of discretion. Whale v. United States, 792 F.2d 951, 952-53 (9th Cir. 1986) (dismissal under Rule 4);

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

**The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 3(f).

***The Honorable Mariana R. Pfaelzer, United States District Judge, Central District of California, sitting by designation.

Brown v. Continental Can Co., 765 F.2d 810, 814 (9th Cir. 1985) (appointment of counsel).

Chambers was a lead auditor for the United States Army Audit Agency ("the Audit Agency"). Chambers raises two claims in this suit: (1) that the Audit Agency violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1981 and 1987 Supp.), when it relocated its Western Regional Office from Redwood City, California to Sacramento, California, and (2) that the Audit Agency has retaliated against Chambers for his opposition to this relocation, also in violation of Title VII. Chambers contends that this relocation constituted "white flight" from an area populated by minorities, and had a disproportionate impact on minority and women employees of the Audit Agency.

Chambers filed this suit on May 30, 1985, after exhausting his administrative remedies with the Equal Employment Opportunity Commission. He apparently mailed a summons and complaint by registered mail to the Audit Agency's Sacramento office, but never attempted to serve either the United States Attorney General or the United States Attorney's Office for the Northern District of California. On September 9, 1985, the District Court denied Chambers' motion for the appointment of counsel. On November 26, 1985 and again on December 31, 1985, the United States Attorney's Office advised Chambers by letter that he had not properly effected service, and the Audit Agency advised the District Court of this fact in its January 7, 1986 Status Conference Statement. On January 10, 1986, the District Court sua sponte dismissed Chambers' complaint pursuant to Rule 4.

The pertinent portions of Rule 4 provide:

> (d) Summons and Complaint: Person to be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
>
> . . . .

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

. . . .

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Therefore, for service on the Audit Agency to have been effective, Chambers would have had to send by registered or certified mail copies of the summons and complaint to the Audit Agency and to the Attorney General, and personally serve these papers on the United States Attorney's Office for the Northern District of California. Chambers does not dispute that he only mailed a copy of the summons and complaint to the Audit Agency.

The Audit Agency does not appear to dispute that it was on actual notice of Chambers' suit within the 120 day period set forth in Rule 4(j). This Court has held that defects in service under Rule 4(d) do not require

dismissal if:

> (a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed.

Whale, 792 F.2d at 953, quoting Borzeka v. Heckler, 739 F.2d 444, 447 (9th Cir. 1984). While parts (a), (b), and (d) of the Borzeka test are arguably met here, part (c) is not. This is not a case like Borzeka or Whale where a plaintiff mailed a summons and complaint to the U.S. Attorney rather than personally serving these papers; in this case, Chambers did not even attempt to serve the Attorney General or the U.S. Attorney. While Chambers is proceeding pro se, his failure to perfect service after the U.S. Attorney's Office twice notified him of the defect in his service leaves him no justifiable excuse for not having complied with Rule 4.

Rule 4(j) requires a district court to give notice before dismissing a complaint on its own initiative. While the District Court apparently did not provide notice in this instance, we have held that such an error is harmless unless the plaintiff can demonstrate that he was prejudiced by the error. Whale, 792 F.2d at 952; Wei v. State of Hawaii, 763 F.2d 370, 371 (9th Cir. 1985). At the time the District Court dismissed Chambers' complaint, it had been pending for 242 days without proper service. As discussed above, Chambers had been notified in writing twice of the defect in his service, and he still had not perfected service. Under these circumstances, Chambers could not have demonstrated "good cause" for an extension of the 120-day period of Rule 4(j), and therefore the District Court's lack of notice to Chambers was harmless as a matter of law. Chambers' failure to serve the Audit Agency properly compels the conclusion that the District Court's order of dismissal must be affirmed.

Chambers also challenges the District Court's denial of his motion for the appointment of counsel under 42 U.S.C. § 2000e-5(f) (1). Since appointed counsel presumably would have remedied the defects in

Chambers' service on the Audit Agency, we can assume that this issue is properly before this Court. But see Green v. Cotton Concentration Co., 294 F. Supp. 34 (S.D. Tex. 1968) (plaintiff not entitled to appointment of counsel until issue joined in case). This Court has held that three factors are primarily relevant to the determination to appoint counsel: (1) the plaintiff's financial resources; (2) the efforts made by the plaintiff to secure counsel on his own; and (3) the meritoriousness of plaintiff's claim. Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266, 269 (9th Cir. 1982); Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981) ("Bradshaw II"); see also Bradshaw v. United States District Court, 742 F.2d 515, 517 (9th Cir. 1984) ("Bradshaw III") (other factors may be properly taken into account).

This is not a case in which the District Court simply failed to exercise its discretion. Brown, 765 F.2d at 814; Bradshaw II, 662 F.2d 1318-19; cf. United States v. 30.64 Acres of Land, 795 F.2d 796, 803-04 (9th Cir. 1986))requests for counsel under 28 U.S.C. § 1915(d) (1966)). The District Court carefully analyzed the three Bradshaw factors and found that while Chambers satisfied the first factor, he did not satisfy either the second or the third factors. The District Court did not find that there were any other relevant factors, and Chambers has not suggested any.

The District Court found that Chambers had only contacted one attorney in his effort to secure representation, and that this attorney declined to accept the case on a contingency basis. While this Court has not imposed any specific minimum number of contacts necessary to constitute diligence in attempting to secure counsel, absent special circumstances not present in the record of this case, one attempt is not enough. See Ivey, 673 F.2d at 269 (ten attorneys contacted); Bradshaw II, 662 F.2d at 1319 (more than ten attorneys contacted); cf. Luna v. Int'l. Assn. of Machinists & Aerospace Workers, 614 F.2d 529, 531 (5th Cir. 1980) (contacting four attorneys constitutes reasonable diligence).

The District Court also found that Chambers' claim had a low probability of success. This Court has emphasized the limited nature of a

district court's inquiry into the merits at the appointment of counsel stage of a Title VII case. Bradshaw II, 662 F.2d at 1309. This Court's review is necessarily even more limited. As the District Court noted, the EEOC found no discrimination in this case after holding extensive hearings on the issue. The Department of the Army also found no discrimination in its review of the facts at issue here. The District Court correctly accorded substantial but not controlling weight to the EEOC finding. Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1309 (5th Cir. 1977); see also Bradshaw II, 662 F.2d at 1309 n.20 (EEOC finding of no discrimination entitled to less weight than finding of discrimination, for purpose of appointment of counsel). Congress did not intend for the EEOC to become another hurdle to overcome in securing representation in Title VII cases; however, especially where as here the EEOC has conducted an extensive investigation, a district court may properly take its findings into account when deciding whether to appoint counsel under § 2000e-5(f) (1).

Chambers devotes the majority of his argument to his contention that the Audit Agency's decision to relocate in Sacramento was a mistake. This Court has no jurisdiction to review this contention except to the extent that it raises an inference of racially discriminatory intent. Chambers points to an internal Army memorandum which concedes that the move would have an adverse impact on female employees, but there are serious questions concerning whether Chambers, a black male, has standing to litigate this contention. The undoubtedly lower cost of living in the Sacramento area as compared to the San Francisco Bay area may reasonably be construed as helpful, not hurtful, to minority employees, and as the EEOC examiner found, Chambers has presented no evidence that the Sacramento area is more segregated than the San Francisco area. Excerpt of Record at 45. Chambers has presented no new evidence which would tend to cast doubt on the EEOC examiner's findings that the Audit Agency did not retaliate against Chambers for his opposition to the relocation, or on the basis of his race. The District Court did not abuse its discretion in concluding that the weakness of Chambers' case, combined with his lack of diligence in

attempting to obtain representation, justified denying Chambers' motion for the appointment of counsel. Brown, 765 F.2d at 814; Ivey, 673 F.2d at 269.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HORACE M. CHAMBERS, Plaintiff-Appellant, -vs- UNITED STATES ARMY AUDIT AGENCY, Defendant-Appellee.	)	CA No. 86-1719 DC No. 85-3531 ORDER

BEFORE: CANBY AND BOOCHEVER, CIRCUIT JUDGES AND PFAELZER*, DISTRICT JUDGE

Chambers' motions for judicial notice, for paid administrative leave and to augment the record are denied. His motion to expedite decision on his petition for rehearing and suggestion for rehearing en banc is granted.

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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*The Honorable Mariana R. Pfaelzer, United States District Judge for the Central District of California, sitting by designation.

No. 86-1719
Plaintiff's Exhibit 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HORACE M. CHAMBERS, Plaintiff, -vs- UNITED STATES ARMY AUDIT AGENCY, Defendant.	No. C-85-3531 SC ORDER DENYING MOTION FOR APPOINTMENT OF COUNSEL

Plaintiff filed this action on May 30, 1985, pursuant to Title VII of the Civil Rights Act of 1964. Plaintiff claims the defendant United States Army Audit Agency ("USAAA") discriminatorily failed to promote him, gave him low performance appraisals, and twice suspended him without pay.

The matter is presently before the court on plaintiff's September 9, 1985, motion for appointment of counsel pursuant to 42 U.S.C. §2000e-f(1)(B). Section 2000e-f(1)(B) provides,

> "Upon application by the complainant [in an employment discrimination action] and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security."

It is well established that there is no automatic right to appointment of counsel in employment discrimination cases. See Slaughter v. City of Maplewood, 731 F.2d 587 (8th Cir. 1984); Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972). In determining whether to grant a motion for appointment of attorney, the court must consider: (1) plaintiff's financial resources; (2) the efforts made by plaintiff to secure counsel; and (3)

whether plaintiff's claim has merit. See Bradshaw v. United States District Court for Southern District of California, 742 F.2d 515, 517 n.1 (9th Cir. 1984). Upon review of the record, the court finds plaintiff's motion to be without merit.

Plaintiff in this case has a monthly income of $2,190. He is married and supports his wife and four children. He indicates that he has personal savings in the amount of $3,000, and property assets valued at $6,500. Plaintiff further claims monthly expenses in the amount of $2,406. Plaintiff notes that his wife plans to return to work in the near future. Plaintiff claims that he has unsuccessfully attempted to hire an attorney in Berkeley, California on a contingency basis; plaintiff does not allege further efforts to find representation. Finally, the record demonstrates that the Equal Employment Opportunity Commission ("EEOC"), after a hearing, has recommended a finding of no discrimination in this case.

While plaintiff has satisfied the first requirement of Bradshaw, he has not demonstrated the requisite "diligent effort" to secure counsel. See Hale v. North Little Rock Housing Authority, 720 F.2d 996, 997 (8th Cir. 1983) (Court found insufficient effort to retain counsel where claimant merely "filed an affidavit from an attorney who stated that he would not accept [claimant's] case on a contingency basis.")

In addition, the court finds that plaintiff has failed to satisfy the third requirement of Bradshaw. In determining whether a Title VII claim has merit for purposes of appointing counsel pursuant to §2000e-(f)(1), the court may not rest its decision solely upon EEOC findings. See Harris v. Walgreen's Distribution Center, 456 F.2d 588, 590 (8th Cir. 1972). It is well established, however, that courts may give "substantial weight" to EEOC determinations. See Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1309 (5th Cir. 1977); Beckett v. Kent County, 488 F.Supp. 70, 73 (W.D. Mich. 1980). In the instant case, the EEOC denied plaintiff's employment discrimination claim, noting that "complainant has not established a prima facie case of race discrimination with respect to any of the "four issues" raised in his complaint. Statement of Findings of Fact and Recommended Decision of the

Discrimination Complaints of Horace M. Chambers, p. 38. Moreover, the court finds no evidence in the record to suggest that the USAAA acted with a racially discriminatory or retaliatory motive in directing plaintiff to fly to a temporary duty site in Oregon, in denying plaintiff's request for a compressed work schedule, and in twice suspending plaintiff for insubordination. Accordingly, the court denies plaintiff's motion for appointment of counsel.

In accordance with the foregoing, it is hereby ordered that:

(1) plaintiff's motion for appointment of counsel pursuant to 42 U.S.C. §2000e-(f) (1) (B) is denied.

Dated: November 15, 1985.

_____

United States District Judge

No. 86-1719
Plaintiff's Exhibit 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HORACE M. CHAMBERS,
Plaintiff-Appellant,
-vs-
UNITED STATES ARMY AUDIT AGENCY,
Defendant-Appellee.

NO. C-85-3531 SC

ORDER OF DISMISSAL

Plaintiff filed this action on May 30, 1985, for employment discrimination pursuant to Title VII of the Civil Rights Act of 1964. Plaintiff has not timely served defendant with the summons and complaint in this case. Accordingly, the court dismisses this action without prejudice. See Rule 4(j) of the Fed. R. of Civ. Pro.

IT IS SO ORDERED

Dated: January 10, 1985.

United States District Judge